

## **Professionalism Commission Minutes, July 13, 2005**

Judge Battaglia called the meeting to order at 4:00 p.m. Absentees included: L. Cumberland, B. Ferguson, R. Greenleaf, Master Helfrich, K. Hickman, Judge Hong, W. Hudson, Judge Legg, N. Monteleone, J. Otway, M. Preston and Master Walters. The minutes from the June Meeting were approved.

Observing that the work of the Professionalism Commission will continue in 2005-06, Judge Battaglia stated that no Commission member should feel obligated to continue, if continued service becomes burdensome.

Judge Battaglia also reported that the Judicial Conference can make discovery opinions available on its web site.

Dan Saunders subcommittee posed the question to which the meeting will be devoted: whether adherence to the proposed professionalism guidelines (Code of Professionalism) should be mandatory. The choice will be (1) all of the Code mandatory, (2) part mandatory, or (3) none mandatory. The subcommittee's feeling is that if the Code is not mandatory, it will be disregarded and consigned to a plaque on the wall.

A question was raised as to whether the Code can be incorporated within the Rules of Professional Conduct, perhaps added to the commentary at Rule 8.4. A comment could be added that it is a rule violation "to violate the Code of Civility." When adopting the most recent version of the Rules of Professional Conduct, the Court of Appeals considered, but rejected, incorporation of the MSBA Code of Civility. To do so, reasoned the Court, would preempt the work of this Commission.

If the Code is to be mandatory, we must change the language of the draft, which at present, sounds aspirational.

Enforcement of the proposed Code is another consideration. A recommendation that the Code be mandatory must be accompanied by a proposed enforcement mechanism. The subcommittee suggested the use of a judge's contempt power or the use of a three judge panel after an infraction. Judge Bennett pointed out that in federal court, a misbehaving lawyer immediately receives a letter, after which the matter is heard by a three judge panel. Another suggestion: If the Code is to be mandatory, can the Attorney Grievance Commission be the enforcement agency?

Concerns about a mandatory code include the possibility that intemperate judges may abuse the Code and that allegations of abuse will become an adjunct to every case - somewhat like frivolous charges under Federal Rule 11.

Judge Battaglia synthesized the group's thinking in a suggestion that a middle

ground may be to add a comment to Rule 8.4 stating that a violation of the Professionalism Code (to be attached as an appendix) may form the basis for a Rule 8.4 violation. Tom Lynch's subcommittee can then take re-drafting of the Code under advisement, with Rule 8.4 in mind.

Judge Battaglia announced that, on August 24<sup>th</sup>, the Commission will vote on the final discovery abuse proposal and on the final proposal by the subcommittee on the unauthorized practice of law. On October 5<sup>th</sup>, the Lynch subcommittee will report on the proposed changes to the Code, with Rule 8.4 in mind.

Judge Battaglia adjourned the meeting at 6:00 p.m.

Various Subcommittee Reports will be made a part of these minutes.